SERVED: January 4, 1995

NTSB Order No. EA-4309

UNITED STATES OF AMERICA
**NATIONAL TRANSPORTATION SAFETY BOARD**
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 14th day of December, 1994

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| DAVID R. HINSON,<br>Administrator,<br>Federal Aviation Administration,<br><br>Complainant,<br><br>v.<br><br>ROBERT A. THOMAS,<br><br>Respondent. | Docket SE-13102 |

**OPINION AND ORDER**

Respondent has appealed from the oral initial decision of Administrative Law Judge William R. Mullins, issued on September 28, 1993, following an evidentiary hearing.[1] The law judge affirmed an order of the Administrator, on finding that respondent had violated 14 C.F.R. 91.13(a).[2] The law judge also

[1]The initial decision, an excerpt from the hearing transcript, is attached.

[2]§ 91.13(a) provides:

affirmed the Administrator's 15-day proposed suspension. We affirm the law judge and deny the appeal.

Initially, there are a number of pending procedural matters we must resolve. First, the Experimental Aircraft Association (EAA) has sought permission to file an amicus curiae brief on behalf of respondent. The Administrator objects on a number of grounds, none of which we find convincing, especially in view of our newly adopted rule authorizing such briefs and setting standards for their acceptance, and the policy behind it. See Notice of Final Rules, Aviation Rules of Practice -- General Revisions, 59 FR 59042 (November 15, 1994). Accordingly, EAA's request is granted and its brief is accepted.[3]

Second, respondent has filed a motion to supplement his brief on appeal to add an additional claim of error. The Administrator objects, and we grant his request that the motion be denied. Respondent offers no explanation why he was unable to include this matter in his appeal brief, and his argument that the Administrator will not be harmed does not constitute the good cause necessary to accept what would, in essence, be a late filing by respondent.

Last, respondent has also filed a response to the

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> No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

[3]By order issued by our General Counsel (NTSB Order EA-4248, served September 8, 1994), the Administrator was invited to respond on the merits to EAA's brief. He did so, and his October 3, 1994 reply is also made a part of the record.

Administrator's reply brief. Respondent offers absolutely no reason why we should consider this prohibited reply to a reply, filed without permission, and we can see no good cause to do so. See 49 C.F.R. 821.48(e). We grant the Administrator's motion to strike this document.

Turning to the merits, respondent is the owner and director of operations for Aero Charter, Inc., a Part 135 carrier. He is also a pilot. On October 30, 1991, respondent and an employee pilot, Thomas Guin, took a company aircraft[4] to Effingham, IL, picked up a potential buyer and flew to Grand Rapids, MI and back to Effingham. Respondent flew various portions of these trips. Mr. Guin was the flying pilot on the return to the company's base at St. Louis' Lambert Field. On the first attempt to land, Mr. Guin lowered the gear handle but no confirmation that the gear was down was made by either respondent or Mr. Guin. They barely avoided a gear-up landing, managing a go-around with an ultimately uneventful landing, but causing some damage to the aircraft's propellers and an antenna. (Respondent noticed that the gear was not down (the gear-down lights were not lit), told Mr. Guin, and Mr. Guin executed the go-around.)

The law judge found that respondent was actively involved in operation of the aircraft, and he therefore should have seen that the green gear-down lights were not on. Accordingly, the law judge affirmed the Administrator's allegation that respondent had

[4]The aircraft was a dual-yoke Swearingen model known as a Merlin-2 (certificated for single-pilot operations).

been careless. On appeal, respondent suggests numerous untoward results that will stem from sanctioning respondent here. After all, respondent argues, he saved the aircraft from a gear-up landing and otherwise was merely offering assistance to the responsible pilot. Both respondent and the EAA characterize this ruling as one that will chill all owner/pilots from participating or assisting in flight operations. Respondent argues that he may not be charged here because this aircraft was certified as a single-pilot aircraft, and that his helping the pilot should be treated no differently than if respondent had been sleeping at the time.[5] The parties contend that respondent was sanctioned not for his own actions but for those of his employee, and with no regard to who was the pilot-in-command (PIC).

We do not agree with appellants' formulations of the law judge's holding, nor do we share their expressed concerns. The law judge did not punish respondent as if he were the responsible PIC, and "his position as 'de facto' owner of the aircraft" (EAA's brief at 7) created no special duty equivalent to that of PIC. The sanction against respondent stems from his own behavior. While he may fortuitously have been the one to notice that the gear was not down, his actions as well as Mr. Guin's,

[5]At one point in his brief, respondent frames the issue as "What the Administrator is saying in this case is that if you possess a pilot certificate, especially if you are an employer, do not get involved in assisting the pilot, even if the pilot asks for help. Better still -- go to sleep . . . ." Appeal at 27.

contributed to that situation.[6] And, respondent's holding a pilot certificate may affect the sanction (i.e., it may affect the duty of care to which he is bound), but one need not be a pilot to violate § 91.13(a).

The focus of this case and the Administrator's prosecution is simple and, we think, eminently valid -- pilots must act responsibly and coordinate cockpit duties. For example, that an aircraft requires only one pilot does not support a conclusion that a second pilot (or even non-pilot) participating in the inflight operations is not accountable for his own actions under § 91.13(a). Such a result is illogical in the extreme and ignores the wording of the rule. Respondent was **not** sleeping, and he was not merely an uninformed passenger helping read a checklist, as in another example respondent offers. Respondent was fully qualified to fly this aircraft in Part 91 service. He does not argue to the contrary. Tr. at 6-7, 84, 104.[7] On this flight home, respondent worked the radios almost all the time. He called out the checklist. He worked the flaps and propeller

[6]Mr. Guin and the Administrator agreed to a 5-day suspension of Mr. Guin's certificate for his role in the incident.

[7]Respondent's counsel, in his opening statement at the hearing, spoke in terms of Mr. Guin being "more qualified." Tr. at 7. In his appeal, respondent contends that he was not "current" in the aircraft, but as a technical matter this is not supported in the record. The most that can be said is that other than a short flight a week before, respondent had not flown the aircraft in 6 months and he thought it was "prudent" to take Mr. Guin. Tr. at 103-104. The primary reason for his taking Mr. Guin, however, appears to be so that respondent could spend some inflight time on the Effingham-Grand Rapids flights just talking with the prospective customer.

position. He called out altitudes, and he searched for and called out the runway environment. Tr. at 16-17. 105-106.[8] In short, he participated in numerous functions normally expected of a second pilot.[9]

One could reasonably conclude that the incident was at least partially the fault of poor cockpit resource management. Mr. Guin testified to his belief that respondent was the PIC. Tr. at 17, 22.[10] When air traffic control asked that the aircraft maintain a higher than normal speed to the outer marker, respondent agreed and overruled Mr. Guin, who testified that, as a result, the lowering of the gear and the approach checklist had to be delayed.[11] Mr. Guin also testified that, if he were by

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[8]The Administrator also alleged that respondent filed the flight plan, and Mr. Guin agreed. Tr. at 16. Respondent testified that he had no such recollection. Tr. at 118. The flight plan itself requires that the PIC be identified, and the computer record of the Effingham-St. Louis flight plan shows respondent as pilot. Despite his argument on this point, respondent offered no evidence to prove or even suggest that he amended that plan to remove his name as pilot. Indeed, he also testified that he had no recollection of amending it. Tr. at 118.

[9]That respondent would not have qualified as a second-in-command for Part 135 service (see Exhibit R-6) is not material to whether he actually performed that function, whether in Part 135 or Part 91 service. See also prior discussion regarding respondent's qualifications to operate the aircraft in Part 91 service.

[10]We reject respondent's suggestion of altered, in some fashion coerced, testimony from Mr. Guin. This argument was made to the law judge, and he rejected it without discussion. On the other hand, Mr. Guin testified that respondent's counsel attempted to obtain from him a statement to the effect that he, not respondent, was PIC and that he had given respondent no duties to perform.

[11]Mr. Guin testified that, normally, on ILS approach with

himself, he would have requested a lower speed at the outer marker and would have, in normal course, performed the checklist and confirmed whether the gear was down or not. Mr. Guin's testimony, overall, suggests that respondent's participation in the cockpit was a proximate cause of the failure to check that the gear had come down. Respondent also obviously was participating as a pilot in the flight operation when he directed Mr. Guin to perform the go-around.[12]

Significantly, respondent's own statement, written the day after the incident (Exhibit A-2), supports the proposition that he also considered himself to be acting as a pilot on the aircraft, and even suggests he felt responsible for failing to verify that the gear was down by checking the indicator lights. The tenor of Exhibit A-2, including respondent's references to two pilots and their duty time, demonstrates his at least initial view that he was actively involved in the flight and culpable in the incident.[13] See also Exhibit R-5 letter from respondent to

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bad weather, the landing gear would be lowered at the outer marker. But the aircraft was traveling too fast to do so. He could not lower the gear until the aircraft speed dropped to 137 knots, and this did not happen until the middle marker. At that point, both pilots were busy with other pre-landing tasks and when Mr. Guin announced that he was lowering the gear, respondent did not verify the fact. Tr. at 17-26. See also Tr. at 26 ("It's standard procedure the other pilot always verifies that the gear is down.").

[12]Although we are not ruling on whether respondent was the PIC (see discussion infra), we note that it is ordinarily the PIC who has sole authority and responsibility to make the decision whether to abort a takeoff or landing.

[13]Respondent's counsel's attempt to impeach this statement is not convincing.

FAA indicating that respondent conducted a seminar for all pilots at Aero Charter to review this incident and landing checklist procedures.[14]

From the foregoing discussion, it should be clear that we agree with the law judge's conclusion that it is not necessary to determine whether respondent was PIC. Nevertheless, we think it important to point out that Mr. Guin's perception that his employer, who was qualified in the aircraft, was the PIC is not an unexpected assumption and that good cockpit crew management requires that two pilots in a cockpit agree prior to flight as to the duties of each. The need for such agreement is not limited, as respondent argues (Appeal at 12, 16-17), to those situations where aircraft specifications and procedures require two pilots. Respondent, as a pilot and Mr. Guin's employer, could have chosen to have no role in the aircraft's operation, could have clearly told Mr. Guin that he was the PIC, or could have stated his intent to perform certain functions and no others. Our decision does not prevent owner/pilots from avoiding responsibility for actions of their pilot/employees. Respondent's own actions and omissions here, however, were careless and contributed directly to this incident.[15]

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[14]That Mr. Guin may have failed in his duty to check that the gear was down does not excuse respondent for his own careless conduct. And, we also note, respondent does not argue that his actions should be excused because the near gear-up landing was caused by an equipment defect (i.e., there was some difficulty lowering the gear on the go-around, and apparently it had been a problem in the past on the aircraft).

[15]Respondent argues that the law judge's decision creates

Respondent also argues that the Administrator's pursuit of an enforcement action is inconsistent with respondent's belief that, after completing a Section 609 check ride, the incident would be "closed." Respondent contends:

> It is fundamentally unfair for the respondent to have been given the impression that the Administrator was cooperating with him just as he was cooperating with the Administrator, that he could be frank and forthright, not having to choose carefully his words because the matter is closed, that he could proceed without the benefit of counsel in this regard, only later to have to defend himself in a proceeding where every word potentially has some other legal meaning or context.

Appeal at 26-27. Respondent does not explain what relief he seeks in this regard, nor does he provide any basis for his belief other than "innuendoes." Tr. at 111. He did not testify that anyone from the FAA advised him that the case was closed, and the FAA inspector testified to the contrary: that he would not have been so told before a decision was reached officially.[16]

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duties that are not spelled out with reasonable specificity and that reasonable notice of the governing standard, which is necessary to impose a sanction, was not provided. We are unconvinced. The regulation at 91.13(a) is clear: no person may operate an aircraft in the proscribed manner. Administrator v. Bischoff, 2 NTSB 1013, 1014 (1974).

[16]Respondent also suggested at the hearing (and the above-quoted language from his appeal suggests) that his letter would not have been written the way it was if he had not believed that the incident was closed. The FAA "Incident Record," Exhibit R-3, narrative states "incident closed with this report." However, respondent could not have relied on this statement as he could not have been aware of it. His letter is dated the day after the incident. The report is dated almost 1 month later. Even if it had been prepared earlier, it is not credible given the timing problems to believe respondent was aware of it before he wrote his letter.

Finally, respondent challenges the 15-day suspension of his certificate. We agree, however, with the Administrator's belief that a suspension is important here to encourage heightened vigilance, and do not find 15 days excessive. We are especially concerned that respondent's rhetoric (see, e.g., Appeal at 27 "assuming respondent was careless and reckless by not falling asleep") fails to acknowledge any responsibility in this case.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The EAA's amicus brief and the Administrator's reply are accepted;

2. Respondent's motion to supplement and respondent's reply brief are denied and stricken, respectively;

3. Respondent's appeal is denied; and

4. The 15-day suspension of respondent's airman pilot certificate shall begin 30 days from the date of service of this order.[17]

HALL, Chairman, LAUBER and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[17]For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).